In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1997

BERNARD HARRISON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a non-jury trial in the United States District Court for the Northern District of Indiana, petitioner was convicted of conspiring to steal a shipment of steel from interstate commerce, in violation of 18 U.S.C. 371 and 659.[1] He was sentenced to a term of three years' imprisonment (all but six months of which was suspended), placed on probation for two and one half years, and fined $5,000. The court of appeals affirmed in an unpublished order (Pet. App. A, pp. 1-6).

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[1]The two co-conspirators named in the indictment charging petitioner with conspiracy, Robert Eugene Yungen and John Clem Hoagland, pleaded guilty prior to trial, and Yungen testified as a government witness.

The evidence showed that pursuant to a scheme to steal shipments of rolled steel from the Youngstown Sheet & Tube Company of East Chicago, Indiana, co-defendant Yungen, a truck driver, picked up a truckload of steel from the Youngstown plant that was destined for a General Electric facility in Louisville, Kentucky (Tr. 39). Rather than take the consignment to its designated destination, however, Yungen met with one Gene Kuyrkendall at a bar on the highway. Kuyrkendall called petitioner to inform him that a contraband shipment was available for purchase. Yungen then drove the steel to the Kedvale Steel Company in Chicago; Kuyrkendall followed in his car. Upon arrival in Chicago, Yungen unloaded the steel and departed, after which petitioner appeared and paid Kuyrkendall $1,500 for the goods (Tr. 41-43, 114). A few days earlier, Yungen and Kuyrkendall had delivered another stolen shipment, on which occasion Yungen met personally with petitioner (Tr. 42-43).

Kuyrkendall had previously made approximately twelve such deliveries of stolen steel to petitioner (Tr. 102). During the transaction that was the subject of the indictment in this case, however, Kuyrkendall was secretly cooperating with the F.B.I., having been arrested and charged in connection with another theft from interstate commerce (Tr. 116). In testifying at petitioner's trial in this case, Kuyrkendall related that he had disclosed to petitioner during one of his previous deliveries that the thefts were facilitated through the cooperation of a shipment clerk at the General Electric facility (co-conspirator Hoagland), who would certify on company shipping documents that the purloined steel was actually delivered (Tr. 108-109).

Petitioner contends that the indictment (Pet. App. A, pp. 7-9) insufficiently apprised him of the charges against him and that the proof adduced at trial varied impermissibly from the charge in the indictment. There is no merit to these contentions.

1. The test for determining the sufficiency of an indictment is whether it sufficiently apprises the accused of the charges against him that he can prepare his defense, and whether it describes the crimes with sufficient specificity to enable him to protect against double jeopardy. *Russell* v. *United States*, 369 U.S. 749, 763-764; *Gaither* v. *United States*, 413 F. 2d 1061, 1066 (C.A.D.C.). In the case of a conspiracy charge, "it is not necessary to allege with technical precision all the elements essential to the commission of the offense which is the object of the conspiracy." *Wong Tai* v. *United States*, 273 U.S. 77, 81.

The indictment in the instant case fully comports with these tests. Petitioner, co-defendants Yungen and Hoagland, and "diverse other persons" were specifically charged with agreeing to steal from interstate commerce two bundles of sheet steel valued in excess of $100, in violation of 18 U.S.C. 371 and 659. Further, it was alleged that this conspiracy was to be effectuated through Yungen driving a truckload of steel from the Youngstown Sheet and Tube Company to a destination designated by petitioner, which was other than the destination indicated on the shipping documents. Petitioner, the indictment stated, was to take delivery of the illicit goods, while co-defendant Hoagland would falsely certify on the shipping documents that the shipment of steel taken by Yungen was delivered to its

proper destination (Pet. App., pp. 7-9). This degree of specificity is more than sufficient under the holdings in *Russell* and *Wong Tai*, as it informed petitioner of the pending charges and protected him against double jeopardy.

2. In claiming a variance, petitioner cites the fact that at trial it was never shown that he dealt personally with Yungen or Hoagland during the transaction which formed the basis of the indictment. Thus it is argued that the proof did not demonstrate a conspiracy between petitioner and the co-conspirators named in the indictment, but one between petitioner and Kuyrkendall (Pet. 7-8). However, it is established that a conspirator need not be shown to have known the specific identities of all members of the alleged scheme. *Blumenthal* v. *United States*, 332 U.S. 539, 556-557. In this case, petitioner was clearly shown to have been aware of at least the participation of Hoagland and Yungen, if not their specific identities. Moreover, a few days prior to the theft specified in the indictment, Yungen had made another delivery, at which time he, as well as Kuyrkendall, personally met petitioner (Tr. 42-43). With respect to Hoagland, petitioner had inquired of Kuyrkendall where he obtained the stolen shipments, to which the latter had told him of "arrangements with a fellow in General Electric" (Tr. 108-109), a reference to Hoagland although not by name. Thus, it is clear that petitioner knew of the existence of Yungen and Hoagland, although he may not have known their specific identities and may have had no direct contact with Hoagland; no more is required. See *United States* v. *Varelli*, 407 F. 2d 735, 742 (C.A. 7).

3. Petitioner also complains that Kuyrkendall was not specifically named in the indictment as a co-conspirator and that there was another impermissible variance between indictment and proof because the indictment stated that Yungen had personally phoned petitioner and had later been paid by him, while the evidence at trial showed that it was Kuyrkendall who had phoned petitioner and received payment.

While Kuyrkendall was not personally named in the indictment, the charge did indicate that petitioner had conspired not only with Yungen and Hoagland, but also with "diverse other persons." The district court found that "Mr. Kuyrkendall was one of these 'other persons' referred to in the indictment. It is well settled that an indictment does not have to name all the conspirators known to the grand jury to be involved in the conspiracy" (Pet. App. A, p. 15). Moreover, as this Court noted in *Rogers* v. *United States,* 340 U.S. 367, 375: "* * * the identity of the other members of the conspiracy is not needed, inasmuch as one person can be convicted of conspiring with persons whose names are unknown." In any event, petitioner can claim no prejudice, for, as he admits in his petition (Pet. 10), the government revealed Kuyrkendall's identity prior to trial.[2]

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[2]Petitioner is thus inconsistent in complaining (Pet. 8) of the denial of his motion for a bill of particulars, which requested the identities of all conspirators involved. In fact, all parties stipulated prior to trial as to certain discovery procedures; included within the stipulation was the government's agreement to disclose the names of all conspirators involved, which disclosure (including Kuyrkendall's presence) was made. Upon the basis of this stipulation, petitioner's motion for a bill of particulars was denied.

With respect to the variance that the indictment stated that Yungen had dealt with petitioner but the proof showed that Kuyrkendall had done so, "[t]he true inquiry * * * is not whether there has been a variance in proof, but whether there has been such a variance as to 'affect the substantial rights' of the accused." *Berger* v. *United States,* 295 U.S. 78, 82. The slight difference between the indictment and proof in this case cannot be said to constitute an alteration of the basic scheme of theft charged by the grand jury and did not prejudice petitioner's rights in any way; it is therefore at most a nonfatal variance.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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